



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

BJG

Docket No: 823-00

21 September 2000

MSG [REDACTED] FMCR
[REDACTED]
[REDACTED]

Dear Master Sergeant [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

It is noted that the Commandant of the Marine Corps (CMC) has directed removal of your contested fitness report for 2 February to 30 September 1997.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 20 September 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB), dated 28 January 2000, and the advisory opinion from the HQMC Military Law Branch, Judge Advocate Division (JAM3), dated 30 March 2000, copies of which are attached. They also considered your counsel's rebuttal letter dated 21 March 2000 with enclosures.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the report of the PERB and the advisory opinion from JAM3. Regarding your contested fitness report for 2 September 1995 to 31 October 1996, they were unable to find that the reporting senior of record lacked sufficient observation to render the report, noting that observation need not be direct. They observed that had the report ended on 14 July 1996, when you assert that your reporting senior changed, it still would have reflected the contested nonjudicial punishment of 8 July 1996. In view of the above, your application for relief beyond that effected by CMC has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to:

 Esq.



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

823-00

IN REPLY REFER TO:
1610
MMER/PERB
28 JAN 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
MASTER SERGEANT [REDACTED] USMC (RET)

Ref: (a) MSgt [REDACTED] Form 149 of 27 Oct 99
(b) MCO P1610.7C w/Ch 1-6
(c) MCO P1610.7D w/Ch 1-3

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 24 January 2000 to consider Master Sergeant [REDACTED] petition contained in reference (a). Removal of the following fitness reports was requested:

- a. Report A - 950902 to 961031 (CH) -- Reference (b) applies
- b. Report B - 970202 to 970930 (EN) -- Reference (c) applies

2. The petitioner contends that the reports were not prepared per the applicable guidelines contained in references (b) and (c) and that some of the ratings in Section B, as well as the comments in the respective Section C narratives/Reviewing Officer's comments, are substantially inaccurate and unjust. It is his position that Captain [REDACTED] should not have functioned as the Reporting Senior for the entire period covered by Report A; that Captain [REDACTED] actually observed his performance for the final three and one half months. The petitioner also contends that the nonjudicial punishment (NJP) reflected in Report A was "erroneously and illegally imposed." Concerning Report B, the petitioner believes the tenor of the evaluation is such that it should have been referred to him for acknowledgment and the opportunity to append a statement of rebuttal. To support his appeal, the petitioner furnishes numerous letters of appreciation and other items which he believes prove the reports to be inaccurate and unfair.

3. In its proceedings, the PERB concluded that:

- a. Report A is both administratively correct and procedurally complete as written and filed. Regardless of the petitioner's beliefs concerning the legitimacy of the NJP recorded in Report A, the fact remains that the NJP was imposed and properly included in the challenged fitness report. In fact,

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in his own rebuttal, the petitioner acknowledged the act that resulted in NJP and apologized for his actions. His objections more than three years after the fact lack both timeliness and credibility. We also offer the following:

(1) While the petitioner may have had [REDACTED] as his direct supervisor, only civilians in the grade of GS-11/above would have been authorized to function as the Reporting Senior. This is specifically stated in reference (b).

(2) Captain [REDACTED] letter at enclosure (3) to reference (a) does not substantiate in any way that she was assigned as the petitioner's Reporting Senior until after the ending date of Report A. We note that she was the Reporting Senior on the evaluation between Report A and Report B.

(3) No where in his rebuttal to Report A did the petitioner challenge Captain [REDACTED] as his rightful Reporting Senior. Had that been an issue, the petitioner should have surfaced it at the time so the Reviewing Officer or Adverse Sighting Officer could have adjudicated and resolved the matter.

(4) The voluminous advocacy letters/letters of recommendation/character references enclosed with reference (a) speak highly of the petitioner. Such would be expected when solicited and offered. However, none of the authors were in the official reporting chain; nor were they responsible for assigning tasks, guiding, counseling, and evaluating the petitioner's overall performance. It simply was not their responsibility to do so; nor is it presumed they were more privy to how the petitioner accomplished his assigned mission than were the reporting officials involved.

b. The removal of Report B is warranted and has been directed.

4. The Board's opinion, based on deliberation and secret ballot vote, is that Report A should remain a part of Master Sergeant [REDACTED] official military record.

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MASTER S [REDACTED] USMC (RET)

5. The case is forwarded for final action.

[REDACTED]
[REDACTED]
Chairperson, Performance
Evaluation Review Board
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

82300
IN REPLY REFER TO:

1070

JAM3

30 MAR 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF MASTER SERGEANT [REDACTED]
[REDACTED] MARINE CORPS (RET.)

Ref: (a) JAGINST 5800.7C (JAGMAN)

1. We are asked to provide an opinion on Petitioner's request for removal from his Official Military Personnel File (OMPF) of the nonjudicial punishment (NJP) he received on 8 July 1996.
2. We recommend that the requested relief be denied. Our analysis follows.
3. Background. On 8 July 1996, Petitioner was punished at NJP for larceny in violation of Articles 121, Uniform Code of Military Justice (UCMJ). Petitioner pled guilty to the offense. On 24 July 1996, Petitioner was convicted in a California State Court for the same offense and received 2 years summary probation (a conditional sentence where the conviction is set aside following successful completion of probation). On 9 November 1998, Petitioner successfully completed summary probation, and the charge was withdrawn and dismissed. The NJP was not entered into the page 12 of Petitioner's SRB, but was referenced in an adverse fitness report. Petitioner contends that the NJP was unjust because it did not meet the procedural requirements of section 0124 of reference (a), specifically, that the officer exercising general court-martial authority did not authorize the imposition of NJP. This argument is without merit.

4. Analysis

a. Reference (a) requires authorization by the officer exercising general court-martial jurisdiction before NJP may be imposed for an offense previously adjudicated by a civilian jurisdiction. Petitioner's case was disposed of at NJP prior to the commencement of civilian proceedings. As such, no permission was required. Further, Petitioner alleges no irregularity in the proceeding itself, the punishment was authorized based on the grade of the officer who imposed it,

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IN THE CASE OF MASTER SERGEANT E [REDACTED]
[REDACTED] MARINE CORPS (RET.).

and there is no evidence that the NJP authority abused his discretion.

5. Conclusion. Accordingly, for the reasons noted, we recommend that the requested relief be denied.

[REDACTED]
[REDACTED]
[REDACTED]

Head, Military Law Branch
Judge Advocate Division